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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1952

No._____

OTTO BOORTZ, *Petitioner,*

vs.

AMERICAN MOTORIST INSURANCE COMPANY, *Respondent*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Brief in Support Thereof

To the Honorable Fred Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

I.

This is an action brought in the Federal District Court of the Northern District of Texas by Otto Boortz, petitioner herein, against American Motorists Insurance Company, respondent, for workmen's compensation under the laws and statutes of the State of Texas.

The trial was by jury, and the only questions presented to the jury were the extent of the injury of petitioner and whether or not petitioner had good cause for the late filing of his claim for compensation.

The statutes of the State of Texas, Article 8307, Sec. 4a, Revised Civil Statutes of Texas, 1925, Acts of 1947 (S.B. 40), 50 Leg., is as follows:

> "Unless the Association or subscriber have notice of the injury, no proceeding for compensation for injury under this law shall be maintained unless a notice of the injury shall have been given to the Association or subscriber within thirty (30) days after the happening of an injury or the first distinct manifestation of an occupational disease, and unless a claim for compensation with respect to such injury shall have been made within six (6) months after the occurrence of an occupational disease; or, in case of death of the employee or in the event of his physical or mental incapacity, within six (6) months after death or the removal of such physical or mental incapacity. For good cause the Board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to notice, and the filing of the claim before the Board."

The paramount question in the case in the trial court was whether or not petitioner, Otto Boortz, had good cause for the late filing of his claim.

Petitioner, Otto Boortz, in 1949 was employed as a route salesman for the Coca Cola Bottling Company of Fort Worth, Tarrant County, Texas.

On November 23, 1949, he was injured in the course of his employment by being thrown against a block of ice. (R. 28-29.) From the date of the injury until the 6th day of January, 1951, *he continued to work and receive his full pay from his employer.* (R. 28.) The record shows that petitioner was sent by the Coca Cola Bottling Company, his employer, from one doctor to another, and that the company doctors held out to him continued hope of recovery, assuring him

that his injury was of a trivial nature. The first two doctors that he saw, Drs. Stow and Snyder, told him, "It was nothing serious" (R. 40.); and "There is nothing but a few strained muscles," and he (Dr. Stow) said to have heat treatments and shots and it would probably be all right in two or three weeks. (R. 30.) Dr. Brown was the next doctor the company sent him to, and Dr. Brown, after X-Rays said, "Well, it is nothing serious, it is not even big enough to call a joint that tore loose", and he said, "These heat treatments and these shots will take care of it." (R. 31.) Dr. Brown had a heart attack (R. 31.); and Dr. Holmes, another company doctor, sent petitioner to Dr. Bussey. (R. 56.) Dr. Bussey then forwarded petitioner to Dr. Morgan. (R. 63.) Petitioner's foreman then advised petitioner to go to Drs. Levy and Lipscomb. (R. 63.) On December 19, 1950, Dr. Lipscomb stated to petitioner, "There is nothing wrong with your back but a strained muscle." (R. 64.) Dr. Brown had stated to petitioner, "Well, it is nothing serious." (R. 31.) On the 20th day of December, 1950, only one day after Dr. Lipscomb had stated to petitioner that "There is nothing wrong with your back but a strained muscle" (R. 64.), petitioner realized that there was something more seriously wrong with his back than a mere strained muscle. (R. 33.)

In petitioner's own words, "Well it was December 20, 1950 and I went ahead and toughed it out until January 6th, and I knew my back had something seriously wrong with it, that it was no minor injury at that time." (R. 33.)

Immediately thereafter petitioner consulted his at-

torneys and claim was promptly filed with the Industrial Accident Board, in Austin, Texas, on the 25th day of January, 1951. (R. 17.)

There was no objection to the charge of the Court to the jury on the finding on "good cause", and the jury found that petitioner had a meritorious case, and waived strict compliance with the limitation as to notice and the filing of the claim before the Industrial Accident Board, finding that petitioner Otto Boortz had good cause for failing to file his claim within the six-months period as provided by law.

Defendant thereafter filed its motion for judgment notwithstanding the verdict (R. 20.), which was overruled by the Honorable Judge who tried the case. This was a fact question, decided in the trial court by the judge and the jury in accordance with the law as interpreted by the appellate courts of the State of Texas. The trial judge and the jury considered the testimony, and found the facts to be in favor of the petitioner.

Respondent appealed to the Circuit Court of Appeals for the Fifth Circuit on the sole question of whether or not petitioner Otto Boortz had good cause for his failure to file his claim within six months from the date of the injury. This question was presented to the appellate court, who in their decision recited,in ..... Fed. Reports, p....., held that as a matter of law petitioner did not have good cause for late filing.

II.

The statutory provision believed to sustain the jurisdiction of this Court is Sec. 347 of Title 28 of the United States Code. The statute of the State of Texas which is involved is Article 8307, Sec. 4a, Revised Civil Statutes of Texas, 1925, Acts of 1947 (S.B. 40), which provides as follows:

> "Unless the Association or subscriber have notice of the injury, no proceeding for compensation for injury under this law shall be maintained unless a notice of the injury shall have been given to the Association or subscriber within thirty (30) days after the happening of an injury or the first distinct manifestation of an occupational disease, and unless a claim for compensation with respect to such injury shall have been made within six (6) months after the occurrence of an occupational disease; or, in the case of death of the employee or in the event of his physical or mental incapacity, within six (6) months after death or the removal of such physical or mental incapacity. For good cause the Board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to notice, and the filing of the claim before the Board."

The Texas decisions of the appellate courts of the State of Texas interpreting and defining this statute are as follows:

> *Williamson v. Texas Indemnity Insurance Co.*, 90 S.W. (2d) 1088, 127 Tex. 71, Tex. Sup. Ct., 1936

Watson v. Texas Indemnity Insurance Co., 210 S.W. (2d) 989, 147 Tex. 40, Tex. Sup. Ct., 1948

Hawkins v. Safety Casualty Co., 207 S.W. (2d) 370, 146 Tex. 381, Tex. Sup. Ct., 1948

Anchor Casualty Co. v. Beeler, 245 S.W. (2d) 303, Tex. Civ. App., 1951

This line of cases defines that good cause as necessary to waive the strict requirements of the statute and state that the question of good cause is a fact question for the determination of the trier of the facts, and is not a question of law, as indicated by the decision of the Circuit Court of Appeals for the Fifth Circuit.

The date of the judgment sought to be reviewed by certiorari is June 27, 1952, and the date of this application for certiorari is October ....., 1952.

III. Questions Presented

The question herein presented is: Does the Circuit Court of Appeals of the United States have the authority or jurisdiction to ignore the interpretations of a State statute as decided by the final appellate authorities of that State in rendering a decision based upon the law of the State itself, or must they follow the decisions of the final authority of the appellate courts of a State which State appellate courts have interpreted such State law.

IV. Reasons Relied On For the Allowance of the Writ

The decision of the said Court of Appeals as to their holding that as a matter of law respondent did not have good cause for filing his claim for compensation at a late date is a decision of an important question of local law in a way probably in conflict with applicable local decisions.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the Seal of this Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its Docket No. 13971, *American Motorists Insurance Company, Appellant, v. Otto Boortz, Appellee*, to the end that this cause may be reviewed and determined by this Court as provided by the Statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the Court; and for such further relief as to this Court may seem proper.

Dated ....., 1952.

WALTER B. SCOTT
McLEAN AND McLEAN

By .....
Attorneys for Petitioner.

504 Burk Burnett Building,
Fort Worth, Texas

SPECIFICATIONS OF ERROR

I.

The Honorable U. S. Circuit Court of Appeals for the Fifth Circuit erred in holding that the question of whether or not a claimant had good cause for a late filing of his claim under the Workmen's Compensation Law of the State of Texas was a question of law, when the unbroken line of decisions of the State of Texas by the final appellate authority of the State had consistently held that such a question is one of fact for the trier of facts, and may be decided as a question of law only when there is no evidence to support such a finding.

ARGUMENT

This Honorable Court, on April 25, 1938, in deciding the case of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, established the following principle:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of Federal concern. There is no Federal general common law."

Without a doubt, our case at bar is governed by the princple set out in the *Erie Railroad* case, supra, because, as will be shown herein, our case deals with a State statute concerning workmen's compensation claims and State decisions interpreting a particular section of that statute.

The statute of the State of Texas which is involved in this controversy is Article 8307, Sec. 4a, Revised Civil Statutes of Texas (1925), which provides as follows:

> "Unless the Association or subscriber have notice of the injury, no proceeding for compensation for injury under this law shall be maintained unless a notice of the injury shall have been given to the Association or subscriber within thirty (30) days after the happening of the injury or the first distinct manifestation of an occupational disease, and unless a claim for compensation with respect to such injury shall have been made within six (6) months after the occurrence of an occupational disease; or, in case of death of the em-

> ployee or in the event of his physical or mental incapacity, within six (6) months after death or the removal of such physical or mental incapacity. *For good cause the Board may, in meritorious cases, waive the strict compliance with the foregoing limitations as to notice, and the filing of the claim before the Board.*" (Emphasis supplied)

The Texas decisions of the appellate courts, and in the main the Texas Supreme Court, which interpret and define this statute, have as a unit declared that whether or not a claimant had good cause for the late filing of his claim for compensation is a question of fact to be determined by the jury or the trier of the facts.

In 1936 the Texas Supreme Court decided the important case of *Williamson v. Texas Indemnity Ins. Co.*, 90 S.W. (2d) 1088. In that case the facts were virtually the same as in our case at bar, and the Texas Supreme Court in reversing the judgment of the Court of Civil Appeals on the question of whether or not the issue of good cause was an issue of law or of fact held:

> "This court has repeatedly held that, if there is *any evidence* in the record to sustain the findings made by the jury or the trial court, the Court of Civil Appeals is not justified in substituting its findings of fact for the findings made by the trial court and the jury, and *render final judgment thereon.*" (Emphasis supplied.)

In the case of *Watson v. Texas Indemnity Ins. Co.*, 210 S.W. (2d) 989, the Supreme Court of Texas, in 1948, had before it the identical question that is presented in the case at bar and in the *Williamson* case,

supra, and again the Texas Supreme Court held as follows:

> "In passing upon an assignment that there was no evidence to support the jury's finding that there was good cause for the tardy filing of the claim, it is elementary that the evidence must be considered in the light most favorable to the verdict, and that if there is any evidence of probative worth to support the verdict an appellate court cannot render a contrary judgment." (Citing the Williamson case, supra.)

The latest Texas case on the subject at bar seems to be the case of *Anchor Casualty Co. v. Beeler*, 245 S.W. (2d) 303, decided by the Court of Civil Appeals of Texas on December 20, 1951. In that case suit was brought in the trial court by the Anchor Casualty Company, an insurance carrier, against one Gerald Beeler, an employee, to set aside an award of the Industrial Accident Board of Texas. The employee brought a cross action for compensation benefits. The District Court rendered judgment in favor of the employee, and the insurance carrier appealed, contending that there was no evidence to support the jury's finding that the employee had good cause for filing a late claim. The court in deciding the case quoted verbatim from the *Williamson* case, supra, and added:

> "It is also generally held that while the term 'good cause', in filing a claim for compensation is not defined by the statute, the test for its existence is that of ordinary prudence, i.e., did the injured employee procsecute his claim with that degree of diligence that an ordinarily prudent person would have exercised under like circumstances

and that consequently whether he has used the degree of diligence required is ordinarily a *question of fact to be determined by the jury or the trier of facts* and that it may be determined against the claimant as a matter of law *only* when the evidence, construed most favorably for the claimant, admits no other reasonable conclusion." (Citing Texas authorities.) (Emphasis supplied.) (p. 305)

In the case of *Hawkins v. Safety Casualty Co.*, 207 S.W. (2d) 370, decided by the Supreme Court of Texas in 1948, the Court, in deciding the case concerning good cause for failing to file claim for workmen's compensation, as in the case at bar, states as follows:

"The term 'good cause' for not filing a claim for compensation is not defined in the statute, but it has been uniformly held by the courts of this state that the test for its existence is that of ordinary prudence, that is, whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Consequently, whether he has used the degree of diligence required is ordinarily a *question of fact to be determined by the jury or the trier of facts.* It may be determined against the claimant as a matter of law only when the evidence, construed most favorably for the claimant, admits no other reasonable conclusion. (Citing numerous Texas decisions.)

* * * *

"The law is well settled that a bona fide belief of a claimant that his injuries are not serious but trivial is sufficient to constitute good cause for delay in filing a claim. It also has been held a num-

> ber of times that the advice of a physician, upon whom a claimant relies, that injuries are not of a serious nature, but are temporary or trivial, is sufficient to justify a claimant's delay until he learns, or by the use of reasonable diligence should have learned, that his injuries are serious." (Citing numerous Texas decisions.)

The facts in the *Hawkins* case, supra, are virtually the same as in the case at bar. Hawkins was injured on July 3, 1945, with a strained back, left knee, and right shoulder. He received various treatments, including X-Rays, had his back taped, and other similar treatments. He then worked for the next seven months, except "he laid off a good many days and on one occasion was off duty for a period of three weeks." And during the time that Hawkins worked after his injury his work was of a lighter nature, exactly as the facts in the case at bar.

Certainly Boortz used all reasonable means available to him to ascertain the seriousness of his condition, and, consequently there was no other way of learning of the seriousness of his injury other than by consulting with doctors, and certainly there was no other means at his disposal that he could diligently use to determine his true condition. All of the evidence shows that he did not learn, and could not have learned, the true extent and condition of his injury until the 20th day of December, 1950, when he finally knew that he was suffering from something more serious than a back strain. (R. 33.)

Petitioner Otto Boortz in 1949 was employed as a route salesman for the Coca Cola Bottling Company

of Fort Worth, Tarrant County, Texas. On November 23, 1949, he was injured in the course of his employment by being thrown against a block of ice. (R. 28-29.) From the date of the injury until the 6th day of January, 1951, he continued to work and receive his full pay from his employer. (R. 28.) The record shows that petitioner was sent from one doctor to another and that the doctors held out to him continued hope of recovery. The first two doctors that he saw, Drs. Stow and Snyder, told him that it was nothing serious. (R. 40.) Doctors Brown and Holmes were the next doctors. Dr. Brown had a heart attack and could no longer attend him. (R. 56.) Dr. Holmes recommended orthopedic care, and forwarded him to Dr. Bussey. (R. 56.) Dr. Bussey then forwarded petitioner to Dr. Morgan. (R. 65.) Petitioner's foreman then advised petitioner to go to Drs. Levy and Lipscomb. (R. 63.) On December 19, 1950, Dr. Lipscomb stated to petitioner, "There is nothing wrong with your back but a strained muscle." (R. 64.) Dr. Brown had stated to petitioner, "Well, it is nothing serious." (R. 31.) On the 20th day of December, 1950, only one day after Dr. Lipscomb had stated to petitioner that "There is nothing wrong with your back but a strained muscle" (R. 64.), petitioner realized that there was something more seriously wrong with his back than a mere strained muscle. (R. 33.) in petitioner's own words, "I went ahead and toughed it out until January 6th, and I knew my back had something seriously wrong with it, that it was no minor injury at that time." (R. 33.)

Immediately thereafter petitioner consulted his attorneys and claim was promptly filed with the Indus-

trial Accident Board, in Austin, Texas, on the 25th day of January, 1951. (R. 17.)

There was no objection to the charge of the Court to the jury on the finding on "good cause," and the jury found that petitioner had a meritorious case, and waived strict compliance with the limitation as to notice and the filing of the claim before the Industrial Accident Board, finding that petitioner Otto Boortz had good cause for failing to file his claim within the six-months period as provided by law.

In the case of *Aetna Casualty and Surety Co. v. Rhine*, 152 Fed. 368 (C.C.A., 5th Cir.), the facts are squarely in point with the facts of the case at bar. In that case the court, speaking through Judge Sibley, approved the rule adopted by the Supreme Court of Texas in the case of *Texas Employers' Ins. Ass'n. v. Clark*, 23 S.W. (2d) 405 (Tex. Civ. App.), as follows:

> "That the employee did not believe his injuries to be serious would clearly afford a good cause for not giving notice and filing claim until it was learned that they were serious. Compensation is not provided for pain and suffering but for loss of wages, and *there would arise no necessity for giving notice or filing a claim so long as the employee lost no time from his work but believed his injuries were trivial.*" (Emphasis supplied.) (135 Tex. 103, 139 S.W. (2d) 82.)

In the *Aetna* case, supra, the court further states that so long as the employee is able to work without much interruption, and is reasonably justified in believing his injury is not serious, and will not disable him, he need not file a claim. In the *Aetna* case the

employee, though violently injured and suffering much pain, was able to stay on the job and was fully paid up to the approximate date of the filing of his claim.

In our case at bar the employee, Boortz, stayed on the job and was paid through January 6, 1951. (R. 28.) The claim was filed on January 25, 1951 (R. 15.), only nineteen days after the employee was unable to continue his gainful employment. In the light of the *Aetna* case and the *Hawkins* case, how can it be said that Otto Boortz knew that his injury was serious, when (1) he was never advised by a physician that it was severe; (2) when he worked or was on the payroll up until and after the date that he actually learned of the severity of his injury? Our case at bar is a perfect illustration of a man who did not want to quit his job, who didn't want to file a claim for compensation, a man who consulted physicians and believed in what they told him. It is an illustration of a man who used all possible caution and diligence to determine the status of his injury before he terminated his employment and/or filed claim for compensation.

In our case before the Circuit Court of Appeals for the Fifth Circuit, at page 95 of the Transcript of the Record, that Honorable Court held that under the undisputed facts in this case there was failure as a matter of law to show good cause, and at page 97 of the Transcript of the Record that Honorable Court held that it could not be claimed that there was an issue of fact on whether or not plaintiff had good cause. Certainly there was a fact issue to be determined by the trier of facts as to whether or not Boortz had good cause. What facts constitute this issue? Tes-

timony that he had received conflicting advice from physicians; testimony that he himself believed that it was a minor injury; testimony that he had been advised that it was a mere back strain; and, further, the fact that he continued to work and draw his pay with only few absences of short duration until he finally filed his claim. Indeed, these elements alone create a fact issue that must be decided by the trier of facts, and in so doing the trier of the fact must test the credibility and veracity of the testimony concerning this vital fact issue, and they must weigh that evidence, and in so doing they determine a fact issue.

Clearly there was an issue of fact in this case, and it was resolved by the jury, the triers of fact in the trial court below, and since there was evidence of probative value adduced to support the finding of the jury, the appellate court cannot tamper with that particular finding. *Watson v. Texas Indemnity Ins. Co.*, supra; *Williamson v. Texas Indemnity Ins. Co.*, supra; *Anchor Casualty Co. v. Beeler*, supra; *Hawkins v. Safety Casualty Co.*, 207 S.W. (2d) 70, 146 Tex. 381, Tex. Sup. Ct., 1948.

Indeed, in prior cases the Circuit Court of Appeals for the Fifth Circuit has agreed wholeheartedly and unanimously with this rule.

In the case of *Royal Indemnity Co. v. Earles*, 153 Fed. (2d) 933 (5th Cir.), 1945, the court stated:

> "The District Judge heard and saw all of the witnesses, including plaintiff. He gave credence not to defendant's doctors and their theory, but to plaintiff and the theory of his witness, and we cannot, as appellant urges us to do, say that this

> testimony was so incredible as to require rejection. In these circumstances, to substitute our judgment for that of the District Judge would be to usurp his province, to take upon ourselves a fact finding function entrusted not to us but to the trial judge." (at p. 934)

In the *Earles* case, supra, the court gives a definitive history of the issue pertaining to whether or not the "good cause" question may be one of law or one of fact, and clearly recognizes that under the Texas decisions interpreting the statute it is a fact question to be decided by the trier of the facts. This is shown in the following statement in their holdings in that case:

> "Coming now to the particular facts of plaintiff's case, we think it may not at all be doubted under the authorities that whether a reasonably prudent person situated as claimant was would have waited until December 1st to file his claim was at worst for claimant a question of fact for the trier, and that the finding that claimant's conduct was in accord with reasonable prudence is amply supported in the evidence. Indeed under precisely applicable authorities, the facts come pretty close to making out good cause as a matter of law." (at p. 937)

Petitioner urges that there can be no question that whether or not a claimant has good cause for the late filing of his claim under the workmen's compensation law of the State of Texas is a question of fact to be decided by the trier of facts.

Particularly is this so in a case such as the one at bar where virtually *all* of the evidence shows that

petitioner acted as a reasonably prudent man would or should have acted in the same or similar circumstances. The jury heard the testimony, weighed its credibility, and found it sufficient. The Honorable Trial Judge saw and heard the witnesses and all the testimony and found for the petitioner. They tried the facts, found facts, and applied the law of the State of Texas.

Petitioner urges that the Honorable Circuit Court of Appeals for the Fifth Circuit erred in this case when it held that as a matter of law petitioner did not have good cause for his late filing, and further by rendering the judgment for respondent herein.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Dated:
October ....., 1952.

.....
Walter B. Scott

.....
W. P. McLean, *Of Counsel,*
Attorneys for Petitioner.

Service on counsel for the respondent and a copy of the above brief, this ..... day of October, 1952, is hereby acknowledged.

.....
Attorney for Respondent.

NOV 22 1952

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 424

OTTO BOORTZ, *Petitioner*

vs.

AMERICAN MOTORISTS INSURANCE COMPANY, *Respondent*

RESPONDENT'S BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI

G. W. PARKER, JR.
B. L. AGERTON
625 Ft. Worth Nat'l Bank Bldg.
Fort Worth, Texas
Attorneys for Respondent

Fort Worth Brief Printing Co., 126 South Main Street Phone FA-4070

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 424

OTTO BOORTZ, *Petitioner*

vs.

AMERICAN MOTORISTS INSURANCE COMPANY, *Respondent*

RESPONDENT'S BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Respondent respectfully submits that the Court of Appeals for the Fifth Circuit followed the settled rule announced by the Supreme Court of Texas in determining the issue presented in this case and that a correct result was reached. The petition for the writ of certiorari advances no ground for the granting of the writ.

I

QUESTION PRESENTED

Petitioner says that the question presented is whether the Court of Appeals has the authority or jurisdiction to ignore the interpretations of a state statute by the final appellate authority of that state in rendering a decision presented upon the law of the state. Of course, such a question answers itself; but that question is not presented. The Court of Appeals followed and based its decision on the authoritative decisions of the Texas Courts.

Under the provisions of the Texas Workmen's Compensation Act, no proceeding for compensation can be maintained unless the claim shall have been filed within six months after the injury; provided that for good cause shown, strict compliance may be waived. Art. 8307, Sec. 4a, Revised Civil Statutes of Texas. The good cause must continue from the date of the injury to the date the claim is actually filed. *Petroleum Casualty Company v. Dean*, 132 Tex. 320, 122 S.W. (2d) 1053.

The good cause contemplated by the statute means such a cause as would be considered a reasonable excuse for not filing the claim by a man of ordinary prudence reasonably mindful of his own interests. Ordinarily the existence of good cause is a question of fact to be determined by the jury, but where the undisputed evidence reflects a state of facts about which the minds of reasonable men cannot differ, it is a question of law to be determined by the Court. *Hawkins v. Safety Casualty Company*, 146 Tex. 381, 207 S.W.

(2d) 370; *Anchor Casualty Company v. Beeler*, (Tex. Civ. App.) 245 S.W. (2d) 303; *Copinjon v. Aetna Casualty & Surety Company*, (Tex. Civ. App.) 242 S.W. (2d) 219, writ of error refused by the Supreme Court of Texas.

Such is the rule recognized by the Court of Appeals in the case at bar. The injury occurred on November 23, 1949. The claim was not filed until January 25, 1951. The Court of Appeals held that the undisputed evidence showed that the petitioner did not act as a man of ordinary prudence and reasonably mindful of his own interests in failing to file his claim for fourteen months and two days after the alleged injury; and further, that the undisputed evidence presented a state of facts about which the minds of reasonable men could not differ.

Thus, the real question presented is whether the Court of Appeals reached a wrong conclusion when it held that reasonable minds could not differ on whether the petitioner had good cause for failing to file his claim as required by the statute.

II

STATEMENT OF THE CASE

There is no conflict in the evidence and since the question here presented is whether the Court of Appeals reached a correct conclusion under the evidence which is not disputed, it is necessary for us to review the evidence in more detail than did petitioner.

Otto Boortz was a route salesman for Coca-Cola Bottling Company of Fort Worth. He testified that he received a back injury on November 23, 1949. (R. 28-29). Although his back pained him considerably, he continued to work. A week later on December 1, 1949, his back was so bad that he went to the Coffey Clinic. He said, "I knew I must have pulled something loose." (R. 29). He told them at the Clinic, "I have to have something done with my back." (R. 29).

At the Coffey Clinic he was examined and treated by Dr. Stow who said that he had some strained muscles but would probably be alright if he had heat treatments and shots every other day for two or three weeks. (R. 30). Boortz continued to go to the Clinic two or three times a week through December and on most of those occasions he was seen and treated by Dr. Snyder. (R. 30). His pain continued and he got no relief, so he went to the Buxton-Pease Clinic, a chiropractic group, where he received treatments from the first of the year 1950 until the last of February, 1950 (R. 31, 40, 41). He said that the chiropractic treatments gave him temporary relief but within two or three hours his back would pain him as badly as ever. (R. 31, 41).

By the last of February or first of March, his back

was so bad that he could not work and had to stay at home for about four days. He said:

> "So, I got down, and I was at home, and my wife called them and said, 'Otto ought to go to another doctor because his back is killing him.'
>
> "And I stayed at home about four days, and he said 'Tell Otto to go to Doctor Howell Brown.' " (R. 31).

According to Boortz, Dr. Brown took x-rays and told him that it was nothing serious, that it "was just a little old joint" and that "it is not even big enough to call a joint, that tore loose." (R. 31). Boortz was working and went to see Brown as frequently as he could but the shots were making him sick, he would be awake at night, was nervous, and from time to time losing a few days from work. (R. 31). Sometime during March, Dr. Brown himself became ill and Boortz changed to Dr. Holmes who was associated with Dr. Brown. After Dr. Holmes had seen and treated Boortz for a short while without giving him any relief, he told him that he "gave up". (R. 56).

Dr. Holmes then referred Boortz to Dr. Thomas B. Bussey, an orthopedic specialist. (R. 32, 56, 69). From about the first of April until the latter part of August or first of September, 1950, Boortz was under the treatment of Dr. Bussey. (R. 57, 70). Beginning in January, 1950, Boortz would lose two, three or four days at a time from his work because of back pain. During the time he was being treated by Dr. Holmes a thirty-day lay-off from work was recommended, but the employers wanted Boortz to continue without losing that much time at once. (R. 57).

When the petitioner first went to Dr. Bussey, x-rays were taken and exercises precribed. After about two weeks, Dr. Bussey put him in a flexion type plaster cast (R. 58) and he wore this for about thirty days. (R. 45). It was removed by Boortz himself while Dr. Bussey was out of the city because the heat made it so uncomfortable for him to wear. (R. 58-59).

The back pain and partial disability continued to grow worse (R. 59), and finally on July 31, 1950, Dr. Bussey put Boortz in the hospital and placed him in traction. (R. 59-61, 71). After being in traction in the hospital for several days during which the weights pulling on his legs gave him some relief from pain, Boortz himself had the traction, pulleys, weight, etc., removed about 1:00 o'clock one morning by an intern because, he said, "It was tearing my legs up." (R. 59-60).

After he was taken from traction and while in the hospital, Dr. Bussey prescribed for him and had fitted a back brace. Petitioner testified that he had worn this brace continuously from that time until the time of trial. (R. 61).

Dr. Bussey reached the conclusion that he had exhausted all other meanse of giving him relief so he advised a fusion operation on the back. (R. 62). Dr. Bussey testified that he had talked with Boortz about the matter prior to that time and had tried to explain the back condition to him. (R. 72). Before finally recommending the operation in August of 1950, Dr. Bussey called in Dr. William H. Morgan, also an orthopedic surgeon, for consultation. Dr. Morgan agreed with the diagnosis and with the recommendation of a

fusion operation. (R. 62, 72, 73). Dr. Renshaw testified this would leave not over five or ten percent disability. (R. 55).

In August of 1950, Dr. Bussey also consulted with Dr. Holmes and Dr. Brown with reference to a fusion operation. (R. 62). This consultation was in Boortz's presence. (R. 62). If there could have been any doubt in Boortz' mind about the seriousness of the injury before this time, the recommendation of an operation surely removed it. However, Boortz testified that Dr. Brown said that the operation "would not be bad, all we have to do is to pull those vertabrae apart and sprinkle a few bones in there, and it will heal right back together." (R. 62).

Boortz was unable to make up his mind whether to have the operation. Dr. Bussey testified that while he had exhausted all conservative means and recommended the operation on the back, he always left the decision on the operation up to the patient. (R. 73). In trying to make up his mind about the operation Boortz talked with Mr. Woodson, one of his superiors at the Coca Cola plant, and Woodson told him that he thought before he was "cut on" he should see some other doctors, suggesting Drs. Levy and Lipscomb. (R. 63).

September 8, 1950 was the first time Boortz went to Dr. C. P. Lipscomb. With reference to this first examination, Boortz testified in part as follows:

> ". . . at first I went in there and he stripped me and gave me a toe test, and raked a pin across my stomach, and other tests, and he said, 'Otto, I will tell you something right now, you have

something awful wrong with your back, but if I can find it or not is another question.'

"Q. Didn't Dr. Lipscomb tell you he thought you should have that operation on your back?

"A. No, sir, he didn't. He said, 'If the injection shots don't help', he said, 'don't let nobody cut on your back unless you have to.' He said, 'If these injections don't help, then I would prefer a spinal fusion', or something like that." (R. 63-64).

Throughout the fall of 1950 from September until the 19th of December, Boortz was constantly receiving treatment from Dr. Lipscomb. At some time either in November or early December, he went to see Dr. Busey again and told him that he was not yet ready for the fusion but that if he had his back operated on, he wanted Dr. Bussey to do it. (R. 73). At the time he went to Dr. Lipscomb he had been "pulled off" his route for the obvious reason that he was unable to do anything but the lightest work because of the back injury. In that connection, the petitioner testified:

"A. Well, I was not doing anything then, they pulled me off of the route, they didn't have me working, I just set around down there at the plant, just collecting, and different things like that.

"Q. You didn't do any work during the fall, is that correct?

"A. Just except collecting, and stuff like that, . . .". (R. 64).

Boortz said that on December 19, 1950, Dr. Lipscomb released him, telling him that there was nothing wrong with his back but a strained muscle and that he would

not operate on the back with a strained muscle. He further testified that Lipscomb told him on December 19, "If I cut on your back and mess it up, and I would be walking down the street, and you would say there goes that big so-and-so that messed my back up." (R. 64-65).

Petitioner said that it was on the very next day, December 20, 1950, that he got down completely and could not go at all. (R. 33, 36, 65). Specifically his testimony about that was as follows:

"Q. Now, my question is, when did you first find out and discover that your back was injured?

"A. Well, it was December 20th.

"Q. What year?

"A. 1950.

'Q. What did you do then?

"A. Well, I was going—

"Q. Wait a minute, how did you learn it at that time?

"A. Well, they sent me back on my big route, and I had worked a day and pulled the route, and I came home, I couldn't hardly make it, but I got home, and we had our Christmas that night.

"Q. You had your Christmas at that time?

"A. The Coca Cola Botting Company, and I was unable to make the Christmas party, I was in such pain. My wife and two boys had to go to the Christmas party and get my bonus.

"Q. Your bonus?

"A. Yes, sir. I stayed home, and the next morning I went back to the Coca Cola Bottling Company, to work, and I stayed around in the office, and I was in pain, and Mr. Welch came out there,

and he said, 'Otto, you are sick, you go on home until you feel better.'

"I did, I went home, and I think I stayed three or four days, until after Christmas, and I went back to work, and my back was giving me so much trouble that I couldn't sleep at night, or nothing, and I went ahead and toughed it out until January 6th, and I knew my back had something seriously wrong with it, that it was no minor injury at that time." (R. 33).

On January 9, 1951, Boortz first went to see W. P. McLean, his attorney, and Dr. H. S. Renshaw. (R. 34). On January 16, Dr. Renshaw gave to Mr. McLean a written report covering his opinion and diagnosis. (R. 51). Dr. Renshaw testified as to the history given him by Boortz at the time of his first examination. (R. 44-45). Boortz told him of the various doctors he had been to, of the treatments he had received, and that Dr. Bussey, who had seen Boortz from April of 1950 to early September of 1950, had recommended a spinal fusion. (R. 45, 51). Dr. Renshaw also recommended a spinal fusion. (R. 55).

The first time the petitioner or his attorney took any steps whatever with reference to presenting or prosecuting a claim for Workmen's Compensation was on January 25, 1951 when the claim was filed with the Industrial Accident Board. (R. 75).

III

ARGUMENT

Petitioner recognized that good cause must be established, and pleaded its existence in the following language:

> "Plaintiff would show that his delay in filing said notice with the Industrial Accident Board was brought about through no fault of his own, but by reason of the Doctors employed by Defendant who failed to inform him of the full extent of his injury and thereby mislead him into believing that the injury was not of a severe nature." (R. 6).

It should be observed that these allegations and all proof offered related only to the period from November 23, 1949 to December 20, 1950. There is *no* evidence of any reason for not filing the claim between December 20, 1950 and January 25, 1951. Yet, the Texas courts hold that the "good cause" must continue until the claim is filed. *Petroleum Casualty Company v. Dean*, 132 Tex. 320, 122 S.W. (2d) 1053. Boortz said he knew his back injury was serious on December 20, 1950. (R. 32, 33, 36, 65).

The leading case by the Supreme Court of Texas and cited by petitioner is *Hawkins v. Safety Casualty Company*, 146 Tex. 381, 207 S.W. (2d) 370. In that case the court stated the rule which is found in many cases both prior and subsequent to that one to the effect that ordinarily good cause presents a question of fact, but may be determined against the claimant as a matter of law "when the evidence, construed most fa-

vorably to the claimant, admits no other reasonable conclusion."

The latest authoritative decision by a Texas court is *Copinjon v. Aetna Casualty & Surety Company*, (Tex. Civ. App.) 242 S.W. (2d) 219 (writ of error refused). In that case the plaintiff received an injury on August 5, 1946. Immediately following his fall, he was taken to a hospital where x-ray pictures were made. After four or five days he was discharged from the hospital and returned to work. He filed his claim with the Industrial Accident Board on December 27, 1948. He continued to work until October 1, 1949, nine months after the claim was filed.

As grounds of "good cause" the plaintiff alleged that at the time of his injury the doctor for the insurance company assured him that he would be all right and that his injuries were of a trivial nature, that he believed this, and that when he saw the doctor from time to time he was always assured by him that he would be all right. Further, that not until December 23, 1948, five days before the claim was filed (with Christmas holidays obviously intervening) did he learn the injuries were serious.

Plaintiff testified that he was assured by Dr. Butler, the insurance company doctor, that he could go back to work, and that he only gave him some pills. He apparently consulted the doctor frequently, however, and he testified that nine months after the accident, the doctor again x-rayed his back and told him nothing was wrong with him. He said that a Dr. Stuart, a naturopath, said there was probably something wrong

with the back but refused to examine him until released by Dr. Butler. He further testified that from the time of the fall he suffered extreme pain and had to walk stooped over, but that he had to continue working because of economic necessity.

In affirming the action of the trial court in giving a directed verdict for the defendant, the court said:

> "Taking as true his statements of pain and suffering undergone by him following the accident of August 5, 1946, appellant's action in delaying the filing of his claim until December 27, 1948, does not meet the standard of ordinary prudence. This conclusively appears as a matter of law. To hold otherwise would be to effectively nullify the statutory provision designed to secure the prompt filing of claims and prevent frauds oftimes incident to the filing of stale demands. *We cannot indulge the over-credulous at the risk of admitting the fraudulent, but must follow the public policy of the state as declared by legislative enactment.* The Court correctly instructed the jury to find the for the appellee." (Italics ours).

To say that Otto Boortz could in good faith believe that his injuries were not serious during all the period of time that he was being treated by nine doctors, several of whom recommended operations, and while he was suffering almost constant back pain, does, in the language of the San Antonio Court of Civil Appeals, surely "indulge the over-credulous." In fact, the evidence here presents a much stronger case for a directed verdict than that in the Copinjon case. The plaintiff in the Copinjohn case presented a much more reasonable explanation of his failure to file than did Boortz.

We see no escape from the conclusion that *Copinjon v. Aetna Casualty & Surety Company* is controlling.

The Court of Appeals held in the case at bar that under his own testimony the minds of reasonable men could reach no conclusion other than that the petitioner was not mislead into believing the injury was not severe and that a reasonably prudent man, under petitioner's own evidence, would not have waited from November 23, 1949, until January 25, 1951, to file his claim.

We respectfully submit that such conclusion is a correct one, that the Court of Appeals recognized and applied the rule announced by the Texas courts, and that petitioner's own evidence showed he did not have good cause for failing to file his claim.

WHEREFORE, respondent respectfully prays that this Honorable Court refuse a writ of certiorari.

G. W. PARKER, JR.

B. L. Agerton

B. L. Agerton

625 Ft. Worth Nat'l Bank Bldg.
Fort Worth, Texas
Attorneys for Respondent